# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 820

10 EAST 40TH STREET BUILDING, INC., PETITIONER

*v.*

CHARLES CALLUS, SAMUEL SAID, LOUIS SAGGESE, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE**

## OPINIONS BELOW

The opinion of the district court (R. 312–321) is reported in 51 F. Supp. 528. The opinion of the circuit court of appeals (R. 339–343) is reported in 146 F. 2d 438.

## JURISDICTION

The judgment of the circuit court of appeals was entered on December 27, 1944. The petition for a writ of certiorari was filed on January 6, 1945, and was granted on February 12, 1945 (R.

346). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

This case, like its companion case, *Borden Company* v. *Borella*, No. 688, this Term, presents the question whether the Fair Labor Standards Act affords coverage to the maintenance employees of an office building occupied to a substantial extent by the executive and administrative personnel of concerns engaged in the production of goods for interstate commerce, but conducting the physical processes of manufacture or mining elsewhere than in the building. As in the *Borden* case, the building also houses tenants engaged in preparing in the building advertising copy, circulars and publicity materials for distribution in interstate commerce.[1] This case differs from the *Borden* case in that the building involved here is not primarily devoted to the production

[1] Portions of the building are also occupied by the sales offices or agencies of firms engaged elsewhere in manufacturing or mining. As indicated below, p. 19, we believe that, at least in some circumstances, selling and marketing activities may properly be regarded as constituting the "production of goods" within the meaning of the Fair Labor Standards Act, but we do not here urge that the decision below be affirmed on this ground. We disagree with petitioner's assertion (Br. 9–10) that "the chief questions for determination herein are whether selling constitutes 'production of goods for commerce' and whether maintenance workers are 'necessary' to such 'production'".

business of any single concern, and in that the building is not owned or operated by any of the firms engaged—as we contend—in the production of goods in the building.

## STATUTORY PROVISIONS INVOLVED

Section 7 of the Act (52 Stat. 1060, 29 U. S. C. 201 et seq.) requires payment of overtime compensation to employees "engaged in commerce or in the production of goods for commerce." Section 3 (j) of the Act defines "produced" and "production of goods" as follows:

> SEC. 3 (j). "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

## STATEMENT

Since respondents' brief reviews in detail (pp. 6–35) the findings and evidence, this statement is confined to a summary of the significant facts underlying the differences between petitioner's and our view of the case.

Respondents are maintenance employees (elevator operators, porters, night watchmen, mechan-

ies, handymen, etc.) in petitioner's forty-eight-story multi-tenant building at 10 East 40th Street in New York City (R. 310–311, 313). The district court found that "executive and sales offices of 20 concerns, carrying on elsewhere the business of manufacturing and mining," occupied 25.8% of the rentable area, that "offices of sales agencies representing 17 manufacturers and mining concerns, carrying on elsewhere the business of manufacturing and mining," occupied 9.3% of the rentable area, and that "10 advertising agents and publicity and trade organizations" occupied 6.6% of the rentable area (R. 313–314, 334).[2] The remainder of the space was occupied by miscellaneous tenants not here claimed to have been engaged in the production of goods for commerce (see R. 313–314). The district court classified the "executive and sales offices" separately from the "offices of sales agencies" (R. 313). It found that the offices in the former class (described as "Class 1") were used for "executive and administrative activities, for conferences, and for taking orders for substantial quantities of merchandise * * *", and also in some instances for

[2] The findings of fact originally related these figures to percentages of the *rented* area (R. 313–314), but were corrected by stipulation of the parties (R. 334). The percentages of *rented* area are given in the opinion of the circuit court of appeals (R. 342–343) as about 29% for the executive and administrative offices, about 7.5% for the advertising, publicity and trade organizations, and about 10.5% for the sales agencies.

advertising and publicity work; whereas offices of the latter type (Class 2) were purely sales agencies (R. 314). The circuit court of appeals adopted the district court's classification and pointed out that the space occupied by "the management groups" (Class 1) plus the space occupied by the publicity concerns (Class 5), "which design a substantial part of the advertising material, lithographed and printed matter, etc., which are shipped in interstate commerce" (R. 342), amounted to a total of 32.5% of the rentable area and 36.5% of the rented area.

Petitioner seeks to minimize these findings of fact by a breakdown of the 20 concerns included by the courts below in Class 1, the "management" or "executive" group (Br. 8). It asserts that "approximately half the total space occupied by this class * * * were purely sales offices" and that only six of the 20 concerns, occupying only 5.1% of the rentable area of the building, "had anything to do with actual production" (*ibid.*). These assertions are not only contrary to the findings of fact, but also are not supported by the evidence in the record. While the offices in this group were used for selling purposes, they were also used for direct management and control of the physical manufacturing at the outside factories.

Petitioner apparently concedes that the activities carried on in the building by the Forbes Lithograph Company, the Arkell Safety Bag Co.,

the Cherokee Spining Co., Standard Magazines, Inc., Domestic Concentrates, Inc., and the Ediphone Division of the Thomas A. Edison Co. have something "to do with actual production."[3] The Forbes Lithograph Company, which has a factory at Chelsea, Massachusetts, prepares the lithograph designs, posters, and window and counter displays in its New York office and then sends them to the Chelsea plant for reproduction (R. 31, 43, 50–53). The creative art work, lettering, designs of pictures and design ideas for window displays and posters are prepared in the New York office under the supervision of the company's art director (R. 42–43). The "layout instructions, size of the type and all the items and details concerning the piece which is ultimately to be manufactured" are prepared by the art director in the New York office (R. 38), and he regularly uses the teletype to communicate instructions "with regard to the size or the color of the outline or anything else in regard to the actual production of the items" which are physically manufactured at the plant in Chelsea, Massachusetts (R. 51–52).

The Arkell Safety Bag Company, which has factories in Brooklyn and Chicago engaged in the business of manufacturing safety bags as linings for bags, barrels or boxes, maintains its executive

[3] These are the "remaining six tenants" of the building which are referred to but not identified by name at p. 8 of petitioner's brief.

and administrative offices in this building (R. 182–183). Both its president and its vice-president are located there (R. 185). Its purchasing department, which is in the building, purchases all raw materials and equipment for the factories (R. 188–189). The New York office also handles insurance for plant equipment, traffic arrangement, and all finance and advertising matters (R. 185–188).

The Cherokee Spinning Company, which has a factory in Knoxville, Tennessee, uses its office in New York both as a sales office and for the styling of handkerchiefs, the designs and sketches of which are sent to the mills (R. 138, 142–143).

Standard Magazines, Inc., publisher of sixty general and fiction magazines with an aggregate circulation of between 33 and 35 million copies, occupies two-thirds of one floor (R. 285, 287). It maintains its main office, including editorial, business and sales departments, in the building (R. 286). The editorial departments perform the usual functions of selecting, editing and correcting manuscripts, preparing layouts, and proofreading (*ibid.*). The purchasing of the paper for the magazines is also done by this office, although the printing is done at four outside plants located in New York, Illinois, New Jersey and Connecticut (R. 286–287).

Domestic Concentrates, Inc., which manufactures food flavors, has a plant in the factory dis-

trict of New York. Its executive offices at 10 East 40th Street are used not only for carrying on the "office detail", but for supervision of the factory operations, and from them "instructions to the factory with relationship to production" are regularly issued (R. 155–156). The office maintains "daily, frequent contact with the factory" (R. 156).

The New York office of the Ediphone Division of the Thomas A. Edison Company receives and handles daily a great number of parts for Ediphone machines (R. 113). Repair work on machines is also done on these premises, as well as the packing and shipping of machines to customers located outside of New York (R. 114–115). This office also receives and ships back to the factory for scrap old obsolete machines, and it maintains daily communication with the New Jersey factory, principally by direct wire. (R. 115).

There is ample evidence in the record to show that most of the others of the twenty concerns are engaged in the building in similar productive processes closely integrated with the physical manufacturing processes carried on in their outside factories. Among the offices which, according to petitioner (Br. 8), do not have "anything to do with actual production" are included, for example, Cluett, Peabody & Company, United Feldspar Minerals Corporation, Beechnut Packing Company, and Eastman Kodak Company.

The record shows that the New York office of each of these companies is engaged in managerial and administrative activities essential to the manufacturing processes carried on in the factories.

Cluett, Peabody & Company, which manufactures men's apparel at its factories, has its "headquarters" at 10 East 40th Street. From there the president "guides the destiny of the company," establishes company policies, and "works with the vice-president in charge of each department" such as production, merchandising, market research, and advertising (R. 234, 237–238). Raw materials are purchased centrally by the New York office for the different factories, and patterns for cloth to be made into garments by the factories are designed here (R. 235–236). The advertising and display department, which is part of the New York office, originates ideas and plans for advertising in magazines, for displays, brochures and pamphlets, and for "market research reports" for the sales department. This material, though largely executed by outside agencies, must be approved and corrected by the advertising manager. (R. 239–240.)[4]

The New York office of United Feldspar Minerals Corporation communicates by correspondence with its mines or plants with respect to

[4] Cluett, Peabody & Company's main sales office is not in this building. It is located at 2 Park Avenue, New York City (R. 239).

"everything connected with the operation of the plants", including production going on at the plants (R. 249). Both the president and the executive vice-president, who "run[s] the corporation", maintain their offices in the building (R. 248–249).

Eastman Kodak Company produces substantial quantities of written and photographic matter on its premises at 10 East 40th Street (R. 69–71). The advertising and publicity work, including photography and copywriting, is designed to publicize the uses of the products made by Eastman Kodak Company and its subsidiary, Tennessee Eastman Corporation (R. 75–76). Eastman Kodak Company maintains a photographic studio and laboratory on the premises for making and printing the photographs, and the copy is also written here. The pictures and releases are sent several times a week throughout the country to newspapers, magazines, and press services such as the Associated Press. (R. 76.)

The Beech-Nut Packing Company, which has food products and confections factories at Canajoharie, Rochester, and Brooklyn, uses its offices at 10 East 40th Street largely for advertising functions, including the creation of advertising ideas, and dealings with publishers and representatives of radio stations (R. 96–98, 100–101). The offices of the president of the company and of the sales manager of the food division are also

located there, and constant communication between the office of the president and the plant at Canajoharie is maintained by direct telephone wire (R. 99).

Among the offices which petitioner describes as "purely sales offices" are those of such companies as J. H. Dunning Corporation and the S. S. White Dental Manufacturing Company. Yet J. H. Dunning Corporation, which is engaged in the business of manufacturing wooden boxes and box shooks with several factories located in different places (R. 161–162), maintains the office of its president in this building. The president is "in constant contact" with the various factories (R. 163). "They [the factories] don't blow a whistle without his approval or sanction," and that includes "blowing the whistle regarding production in these various factories" (R. 163). "Everybody takes his orders from 10 East 40th Street" (R. 164). The office is connected by teletype with all the factories (*ibid.*). The S. S. White Dental Manufacturing Company's office in this building also maintains a close connection with the company's plant in Staten Island, where flexible shafting for industrial uses is manufactured (R. 175–176). The "sales engineers" located in the office draft the designs and specifications for the shafting needed by customers, and these designs and specifications are sent to the factory which produces the article "directly pur-

suant to [such] design[s]" (R. 179). The office is in direct communication with the factory through a teletype machine (R. 177). The same type of integration between office and factory was similarly proved with respect to the other concerns included by the courts below in the "management group," with the possible exception of four of the companies.[5] Even if these four companies are excluded from the group, the percentage of space occupied by the other sixteen tenants in Class 1 is 19.81% of the total rentable area and 22.26% of the rented area in the building.[6]

[5] The evidence regarding the Chase Brass and Copper Company, Blackington & Company, the Export Division of the Thomas A. Edison Company, and the Tennessee Eastman Corporation is deficient in this respect (R. 197, 193, 124, 64). These four companies occupy 12,155, 980, 2500, and 920 square feet, respectively (R. 196, 193, 112, 124, 64).

[6] The total rentable area in the building is 234,245 square feet and the rented area is approximately 208,478 square feet (R. 313). The following table shows the space occupied by the sixteen tenants who carry on management activities closely integrated with their manufacturing elsewhere:

| | |
|---|---|
| Forbes Lithograph Co. | 3,360 sq. ft. (R. 56) |
| Olliett, Peabody & Co. | 10,010 sq. ft. (R. 234) |
| Standard Magazines, Inc. | 5,700 sq. ft. (R. 285) |
| J. H. Dunning Corp. | 1,400 sq. ft. (R. 161) |
| S. S. White Dental Mfg. Co. | 1,510 sq. ft. (R. 175) |
| Arkell Safety Bag Co. | 2,510 sq. ft. (R. 183) |
| United Feldspar Minerals Corp. | 980 sq. ft. (R. 248) |
| Eastman Kodak Co. | 4,450 sq. ft. (R. 69, 83) |
| Vanity Fair Mills | 6,415 sq. ft. (R. 165) |
| Ames Bag Co. | 300 sq. ft. (R. 228) |
| Perolin Co. | 1,930 sq. ft. (R. 209) |
| Beech-Nut Packing Co. | 2,690 sq. ft. (R. 97) |
| Cheruface Spinning Co. | 770 sq. ft. (R. 137) |
| Domestic Concentrates, Inc. | 200 sq. ft. (R. 153) |

The advertising, publicity and trade organizations, occupying 7.5% of the rented and 6.6% of the rentable area in the building, carry on publicity, copywriting and editorial work which is intended for national circulation. Carl Byoir & Associates, public relations counsel to a number of large companies such as the Aluminum Company of America, Libby-Owens Company and the Pullman Company, employ copy writers and photographers at their 10 East 40th Street offices to produce newspaper releases, magazine and feature articles, radio scripts and photographs (R. 89–91, 93–95).[7] Between 15,000 and 20,000 pages of releases and copy are mimeographed on the premises each week, 90% of which are sent outside of New York State to different groups, including 17,000 newspapers (R. 93–94, 85, 92). Other tenants engaged in publicity and advertising work prepare advertising for industrial and technical clients, including preparation of copy, layouts, booklets and direct mail advertising for

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| | |
|---|---|
| General Motors Inc. (Cleveland Diesel Engine Division) | 2,140 sq. ft. (R. 61) |
| Thomas A. Edison Company (Ediphone Div.) | 2,300 sq. ft. (R. 112) |
| Total | 46,425 sq. ft. |

The total space occupied by the "management group" (including the space occupied by the four tenants named in fn. 5, *supra*) is 62,980 square feet, more than 2,000 feet greater than the figure given by petitioner (Br. 8).

[7] An affiliated organization handles the Atlantic & Pacific Tea Company account exclusively (R. 95).

out-of-State circulation (R. 103–104, 134–136). Several monthly magazines on technical subjects are also prepared, though not printed, in this building for interstate distribution. They include "Textile Research," published by the Textile Research Institute, "Your Investments," published by the American Investors' Union, "Rayon Organon," published by the Textile Economic Bureau, and a weekly publication of the Allied Liquor Industry (R. 190–191, 262, 292, 247).

If the space occupied by these advertising and publicity organizations is added to the space occupied by the executive or management group of tenants, the total is well over 25% of either the rentable or the rented area in the building.

The district court's findings of fact establish that the work of the maintenance employees bears a very close and direct relation to the activities of the above described tenants. The court not only found that these employees "performed the customary duties incident to the effective maintenance and operation of this office building," such as the furnishing of heat and hot water, keeping the elevators, radiators, water and fire sprinkler systems in repair, and operating the elevators; it found also that they engaged in "carrying advertising matter, publicity releases, photographic material, magazine layouts, commercial art drawings, printers' and lithographers' proofs, con-

struction plans and specifications, Diesel engine parts, Ediphone machines and parts, samples of merchandise, office furniture and equipment and supplies to and from tenants' premises" (Fdg. 10, R. 316). The district court further found that the labor of these building service employees "has been performed as a useful adjunct and a necessary incident to the successful and efficient operation of said office building and to enable the various tenants to conduct their activities conveniently and efficiently * * *" (Fdg. 11, R. 317).

The district court found, however, that the maintenance employees were not "substantially engaged in activities having a close or immediate tie with the production of goods of any kind" (R. 317), and that they were not engaged "in commerce." These findings were presumably predicated on the court's earlier findings that "no manufacturing of any kind" was carried on in the building by the executive, administrative and sales offices of manufacturing concerns, and that the space used by the advertising, publicity and trade organizations was "not substantial" in relation to the volume of business carried on in the building as a whole (R. 316).

The circuit court of appeals reversed (R. 339–343). It held that a substantial portion of the building was occupied by tenants engaged in the building in the production of goods for commerce,

and that the maintenance employees were engaged in occupations necessary to such production. This conclusion was premised on the grounds (1) that "persons who comprise management as well as those physically engaged in the manufacture of goods are so engaged in production as defined by the Act as to bring the service employees of the office building in which they are located under the coverage of the Act" (R. 341); (2) that the work of the publicity concerns on advertising material, lithographed and printed matter, etc., constituted production of goods for commerce (R. 342); and (3) that the sales agencies representing mining and manufacturing concerns were engaged in the production of goods because their activities in arranging the transfer of goods from one person to another constituted both "handling" and "transporting" such goods, and also because their activities were "economically necessary to the production of goods" (R. 342–343). The court commented that the 20% standard applied by the Administrator for enforcement purposes in cases like this was a "sensible one for the courts to adopt" in deciding whether a substantial portion of a building is devoted to the production of goods for commerce (R. 342).[8] Since the space occupied by the

[8] It is important to point out that the Administrator does not regard the 20% standard as a measure of what is "substantial" in the sense in which that word was used in *Walling*

"management group" and the publicity group totaled 32.5% of the rentable area and 36.5% of the rented area, and the additional space occupied by the sales agencies would bring the proportions to 42% and 48%, respectively, the court ruled that the maintenance employees were within the scope of the Act under the principles announced in its decision in *Borden Company* v. *Borella*.

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v. *Jacksonville Paper Co.*, 317 U. S. 564, at 572 (see pp. 29–31, *infra*). The decisions of the courts indicate that a much smaller proportion of interstate business may suffice to bring employees engaged in occupations necessary to such business within the scope of the Act. See *infra*, pp. 26–29. The court's statement that "the Wage and Hour Division has adopted a standard of 20%" refers to an announcement by the Administrator that "in view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings," he would take "no further enforcement action * * * with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." See release of Wage and Hour Division, dated November 19, 1943, P. R.–19 (rev.). A copy of this release is printed as an appendix to this brief.

This release was not intended to represent the Administrator's official interpretation of the Act, but was simply a statement of enforcement policy pending further clarification by the courts. The application of a flat percentage rule would be consistent neither with the policy of the Act nor with the decisions of this Court. As more fully explained below (pp. 29–31), the selection of the 20% standard for enforcement purposes rests upon what seems to us a reasonable assumption that building maintenance employees will almost unavoidably devote a substantial part of their time to the production of goods for commerce if as much as 20% of the building is occupied by tenants engaged in such production.

## SUMMARY OF ARGUMENT

Here, as in the *Borden* case, petitioner starts with the premise that the maintenance employees of a building cannot be "necessary to the production" of goods unless the physical processes of manufacture of such goods are carried on in the building (Br. 20). Petitioner argues further (Br. 13, 30–32) that the building must be "principally devoted" to such production, and attacks the 20% space standard applied by the court below. We believe that the relevant and controlling factors are (1) that the management activities of a production enterprise are as much a part of the "production of goods" for commerce as are the physical manufacturing processes; (2) that the test for determining coverage of the maintenance employees is not whether the building is "principally devoted" to production of goods for commerce but is whether a substantial part of the employees' time and duties are related to such production; and (3) that the facts in this record, not only with respect to the space occupied by tenants engaged in such production of goods for commerce but also with respect to the nature of the employees' duties, demonstrate that the maintenance employees unavoidably spend a substantial part of their time in work necessary to such production. The proportion of the building occupied by tenants engaged in production of goods for commerce is material only

insofar as it bears upon the question whether a substantial part of the employees' duties relates to production of goods for commerce. The 20% standard is not to be regarded as a conclusive test, but rather as a guide to assist in reaching a practical judgment on this question.

## ARGUMENT.

### RESPONDENTS ARE ENGAGED IN OCCUPATIONS "NECESSARY TO THE PRODUCTION" OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT.

*Introduction.*—It is our view that the court below correctly held respondents to be covered by the Act. We think that its judgment should be upheld on the basis of the production activities of the "management group" and the publicity and advertising group of tenants, and that it is unnecessary to rely on the ground that the selling and marketing activities constitute "production of goods." Selling and marketing functions undoubtedly are necessary to production, and in some circumstances are as closely integrated with the physical manufacturing processes as are the executive and supervisory functions carried on by the offices classified by the courts below as the "management group".[9] However, we do not believe that the determination of the instant case depends on this proposition.

[9] For example, where the volume and kind of goods to be manufactured are directly determined by purchase orders or by sales forecasts, as appears to be the case with respect to a

A. THE ACTIVITIES CARRIED ON BY THE "MANAGEMENT" AND PUBLICITY GROUPS OF TENANTS CONSTITUTE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT

As pointed out in our brief *amicus* in the *Borden* case (pp. 13–23), there is no basis in the Act or in the decisions of this Court for rigidly construing the term "production of goods" to mean only physical manufacturing processes. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524; *Armour & Co.* v. *Wantock*, 323 U. S. 126, 129; *Walton* v. *Southern Package Corp.*, 320 U. S. 540. Management functions closely integrated with manufacturing processes are as much a part of the manufacturing and production processes as the physical making of the goods. Likewise, the writing and preparation of mimeographed, photographic and written materials such as pamphlets, magazine articles and advertising copy are as much production of goods as the manufacture of clothes, lumber and like commodities. In the instant case, as in the *Borden* case, both of these types of production of goods for commerce are carried on in the building which respondents maintain.

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number of the production concerns which maintain sales agencies at 10 East 40th Street. See, e. g., as to purchase orders, R. 291 (Wheeling Stamping Company); R. 256 (Birmingham & Prosser Co., Inc.); R. 141 (Cherokee Spinning Company); R. 176–177 (S. S. White Dental Mfg. Co.); R. 40–41 (Forbes Lithograph Company); R. 66 (Tennessee Eastman Corp.); as to sales forecasts, R. 210 (Perolin Company); R. 170 (Vanity Fair Mills).

Although with respect to the management activities the instant case is more complex than the *Borden* case, the record here shows that many of the executive offices in this building are integrated with the operation of factories in much the same way as the Borden executive offices are integrated with the Borden factories. The main difference here is that the management activities are integrated with several businesses rather than with a single business; but, as shown by our summary of the evidence, *supra*, pp. 3–14, they are none the less integral parts of the several manufacturing and mining businesses. From a "practical" viewpoint the management activities of the tenants in this building constitute, as in the *Borden* case, "part of an integrated effort for the production of goods" (see *Armour & Co.* v. *Wantock*, 323 U. S. 126 at 130, and other cases cited in our brief in the *Borden* case, pp. 14, 18–20). Petitioner's "twice removed" argument (Br. 20), as more fully explained in our brief in the *Borden* case (pp. 18–19), gives unwarranted rigidity to the definition of "production" and obscures rather than clarifies the issue of what constitutes production within the meaning of the Act.[10]

[10] The decisions of state and lower federal courts which, as petitioner contends, have held office building maintenance employees to be without the coverage of the Act have been discussed in our brief in the *Borden* case (pp. 23–26), and will not be reexamined here.

The physical production of "goods" such as magazine articles, mimeographed and photographic materials, and other advertising and publicity matter is more significant in the instant case than in the *Borden* case, because of the great quantities of such goods produced in the building here. For example, Carl Byoir & Associates, occupying one whole floor and part of another (R. 83), produce between 15,000 and 20,000 pages of mimeographed materials per week, 90 percent of which are sent outside the state (*supra*, p. 13). Standard Magazines, Inc., which occupies two-thirds of one floor (R. 285), produces 60 general and fiction magazines with a national circulation (*supra*, p. 7). Eastman Kodak Company, which occupies space on two floors (R. 69–71), likewise produces large quantities of written and photographic matter. Displays, brochures, and pamphlets are also produced by Cluett, Peabody & Company (*supra*, p. 9), by the Perelin Company (R. 211), and by the Forbes Lithograph Company (*supra*, p. 6). In addition, several monthly magazines on technical subjects are prepared in the building (*supra*, p. 14). There would appear to be no question, since this Court's decision in *The Western Union Telegraph Co.* v. *Lenroot*, No. 49, this Term, slip opinion, p. 9, that these magazine articles, pamphlets, photographs and like materials are "goods" and that the writing and preparation of them constitute "production

of goods" within the meaning of the Act (see our brief in the *Borden* case, p. 27).

Factually, this case differs from the *Borden* case in that in the latter the building was owned, operated and principally occupied by one company engaged in productive activities. However, the *Kirschbaum* decision shows that maintenance employees may be covered where their activities relate to production carried on by several different companies, and thus establishes that integration with the business of one particular company is not essential to establish the required "close and immediate tie" between the maintenance employees and production of goods for commerce. 316 U. S. at 525. The *Kirschbaum* case also indicates that the owner of the building which employs the maintenance employees need not itself be engaged in the production of goods for commerce; "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities". *Id.*, at 524. If we are correct in our thesis that the activities carried on here, and in the Borden Building, constitute production within the meaning of the Act, the sole remaining question as to the controlling force of the *Kirschbaum* case lies in the difference in the proportion of space devoted to production. In the *Kirschbaum* case the tenants in both buildings were "principally engaged" in production; in one they were "for

the most part" manufacturers, and in the other "practically all" of them were similarly engaged.[11] The dominance of the Borden Company's activities in its own building may fairly be said to bring it into the same category. Here, the proportion of tenants engaged in production is less—on our theory more than 25% but on any theory less than 50%. Whether this difference of proportion is sufficient to take the case out of the *Kirschbaum* rule is considered under our next point.

B. THE AMOUNT OF SPACE OCCUPIED BY THE TENANTS ENGAGED IN PRODUCTION OF GOODS FOR COMMERCE IN THE BUILDING AND THE EVIDENCE REGARDING RESPONDENTS' DUTIES SHOW THAT RESPONDENTS ARE SUBSTANTIALLY ENGAGED IN OCCUPATIONS NECESSARY TO SUCH PRODUCTION.

This Court's decisions make it clear that an employee's duties, to fall within the Act, need not be entirely or principally devoted to commerce or to the production of goods for commerce. See *United States* v. *Darby*, 312 U. S. 100; *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.[12] It

[11] The opinion of the Court recites (316 U. S. at 518–519) that practically all the tenants "manufacture or buy and sell ladies' garments"; but the record in that case indicates that approximately 90% of the tenants were engaged in the physical manufacture of goods in the building.

[12] Congress, in enacting the Fair Labor Standards Act, "has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer." *United States* v. *Darby*, 312 U. S. at 123. Cf. *Connecticut Light and Power Co.* v. *Federal Power Commission*, No. 189, this Term, slip opinion, pp. 15–16. And see *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, where this Court held employees entitled to recover under the Act on the ground that "some of the oil produced ultimately found its way into interstate commerce" (317 U. S. at 91). "The court did not say how much, nor whether the amount made any difference" (*Berry* v. *34 Irving Place*

suffices that "a substantial part of an employee's activities related to goods whose movement in the channels of interstate commerce was established * * *." *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 at 572. In determining whether "a substantial part" of the duties of the employees in such a case as this relates to and is necessary to production, two questions have to be answered: (1) whether the proportion of production business carried on in the building is substantial; and (2) whether the proportion of the employees' activities which is necessary to such production business is substantial.

In the instant case, the first question answers the second. For there is neither assertion, evidence, nor finding that the activities of the employees are devoted to the business of particular tenants otherwise than in direct proportion to the office space which such tenants occupy. The findings of the district court establish that the labor of the maintenance employees "has been performed as a useful adjunct and a necessary incident to the successful and efficient operation of said office building and to enable the various tenants to conduct their activities conveniently and efficiently, and said tenants have regularly and continuously had use of and derived the intended benefit from the various facilities so provided" (R. 317). Under this finding, the tie between the work of the maintenance employees

and the business of the tenants, including the tenants engaged in production, cannot be any less "close and immediate" than was held to be the case in the Kirschbaum decision (316 U. S. at 525). If, therefore, the proportion of the production business carried on in the building is large enough to be "substantial", it must follow that the maintenance employees are likewise substantially engaged in occupations "necessary" to such production business. The question, then, is whether on the facts of this case the production business carried on in the building is substantial.

This is not an unusual problem under the Act. In most businesses engaged in commerce or in the production of goods for commerce, the employees work indiscriminately with relation to both interstate and intrastate transactions. See *United States* v. *Darby*, 312 U. S. 100, 117–118. The courts are virtually uniform in holding in such cases that an employee is within the protection of the Act if the interstate transactions to which his duties are necessary constitute a regular part of the business and are not inconsequential or sporadic. See *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8); *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Muldowney* v. *Sea-*

*berg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.); *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.).[13] None of the decisions holds that the business to which the employee's duties are necessary must be shown to be "principally devoted" to interstate tranactions (cf. Pet. Br. 13–14). As was said in the *Engel* case, an employee's interstate activities are sufficiently substantial to bring him within the scope of the Act if such activities constitute "a part of the work-a-day duties of the employee," and his contribution to production for commerce is "both consistent and continuous," "not merely sporadic and isolated" (145 F. 2d at 640).

No reason appears why this principle should not apply to maintenance employees performing service indiscriminately for tenants who engage in production of goods for commerce and for tenants who do not. In all cases where the interstate and intrastate business is commingled, the problem is to determine whether the interstate aspects are substantial, or merely incidental and inconsequential. The problem here does not differ in substance from that of employees in a factory producing goods only a fraction of which is intended for shipment in interstate commerce. In such cases, while the proportion of goods

[13] But compare *Super-Cold Southwest Co.* v. *McBride*, 124 F. 2d 90 (C. C. A. 5); *James V. Reuter* v. *Walling*, 137 F. 2d 315 (C. C. A. 5), reversed on other grounds, 321 U. S. 671.

shipped in commerce may be regarded as some indication of the substantiality of the employee's interstate activities, it is recognized that no flat percentage standard can be applied. In some cases the proportion of interstate business has been as low as a fraction of 1%,[14] but nevertheless has been held substantial enough to bring within the Act employees whose regular day-to-day duties relate

[14] See *Sun Pub. Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728, holding the Act applicable to employees of a small newspaper shipping about 2% of its circulation out of the State; *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4), where the dollar volume of the goods shipped in interstate commerce was roughly 1.1% of the total sales; *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10), holding the Act applicable to an engineer of an electric power company where 3.7% of the electricity produced was supplied to interstate businesses; *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8), where less than $\frac{1}{6}$ of 1% of defendant company's revenue was derived from interstate calls and the number of such calls was "trifling" as compared with the total number; *Strand* v. *Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn.), holding the Act applicable where 4% of calls were interstate; *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. N. Y.), holding the Act applicable to employees of an elevator manufacturing and repair company whose interstate business amounted to only $\frac{3}{4}$ of 1% of the company's total business. See also *Cooper* v. *Gas Corp. of Michigan*, 4 Wage Hour Rept. 550 (C. C. Mich., Mason Co., 1941), $\frac{58}{100}$ of 1%; *Steger* v. *Beard & Stone Elec. Co.*, 4 Wage Hour Rept. 411 (N. D. Tex., 1941), 1%; *Lewis* v. *Nailling*, 36 F. Supp. 187 (W. D. Tenn.), 1%; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), decision on appeal affirmed without opinion, 315 U. S. 784, under 2%; *Ling* v. *Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Mich.) 2%.

indiscriminately to the interstate as well as the intrastate business.[15] The controlling factor is that the interstate part of the business is not inconsequential, but is "a continuous, regular and integral part of his everyday and every week business." *McKeown* v. *Southern California Freight Forwarders*, 52 F. Supp. 331, 333 (S. D. Calif.); see also *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10); *Schmidt* v. *Peoples Telephone Union of Maryville, Mo.*, 138 F. 2d 13, 15 (C. C. A. 8).

We believe that the Administrator's 20% standard (see pp. 16–17, *supra*) is, as the court below observed (R. 342), "a sensible one for the courts to adopt." The meaning of this standard should, however, be clearly understood. It is in no sense a measure of substantiality as that test was applied in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 572, and the other cases cited above. Rather, it is an administrative rule of thumb, adopted for enforcement purposes in the particu-

[15] If it is proved that a particular employee did not render any service in connection with the interstate business, or that his duties with respect thereto are only occasional, he would not be covered. According to the better view the burden would be on the employer to produce such evidence. *Guess* v. *Montague*, 140 F. 2d 500 (C. C. A. 4). See also *United States* v. *Darby*, 312 U. S. 100, 117–118; *United States* v. *New York Central Railroad*, 272 U. S. 457, 464. *Cf. contra*, *James* v. *Reuter* v. *Walling*, 137 F. 2d 315 (C. C. A. 5), reversed on other grounds, 321 U. S. 671. As noted above (pp. 14–15), the findings established that respondents' duties regularly related to the interstate business carried on in the building.

lar area of office building maintenance employees. As petitioner here points out (Br. 30–32), and as the court below recognized in the later case of *Fleming* v. *Post*, 146 F. 2d 441, it is plain that to establish that 20% of the tenants (in terms of floor space) are engaged in production is far from establishing that 20% of the building is devoted to production or that 20% of the activity of the tenants is production activity. As the cases cited above show, a firm may be "substantially" engaged in production when far less than all of its activities are of that character. Yet to establish the actual percentage of production activity in a multi-tenant building poses a practical and administrative problem of great complexity. The Administrator accordingly, for enforcement purposes and pending clarification by the courts, proceeds on the working hypothesis that when as much as 20% of a building is occupied by firms substantially engaged in production, then the amount of production activity in the building as a whole—and by the same token the amount of work of the maintenance employees which is related to and necessary to such production activity—will be large enough to meet the test of substantiality developed and applied by the courts. The Administrator's promulgation of the 20% test represents, of course, no more than a statement of his enforcement policy, publicly announced for the convenience of building operators

everywhere; but we submit that the working hypothesis which it adopts rests upon a rational basis, and might well be accepted by the courts as an adequate guide to the determination of all cases which, like the case here, involve no peculiar factors taking them out of the reason of the rule. But whether or not the Administrator's test is accepted, we submit that on the record here the proportion of production activity carried on in the building is clearly great enough and regular enough to be deemed "substantial," and that the maintenance employees, being regularly engaged in occupations necessary to the performance of such substantial production activity, should be held to be within the coverage of the Act.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

**Respectfully submitted.**

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APRIL 1945.

## APPENDIX

For Release Friday
November 19, 1943

PR-19 (rev.)
(Substitute for PR-19)

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR DIVISION
165 West 46th Street
New York 19, New York

There will be no further enforcement of the wage and hour provisions of the Fair Labor Standards Act in regard to maintenance workers in office buildings occupied by tenants engaged solely in interstate commerce, L. Metcalfe Walling, Administrator, announced last night at a dinner of the Management Division of the Real Estate Board of New York, Inc.

The nationwide administrative policy, which Mr. Walling said becomes effective today, was adopted after recent court decisions which distinguished between maintenance employees in loft buildings in which the tenants produce goods for interstate commerce, who are covered, and similar employees, held not to be covered, who work in office buildings whose tenants only engage "in interstate commerce" rather than engage "in the production of goods for interstate commerce."

Mr. Walling made clear that the administrative policy will remain in effect unless the courts should indicate coverage or until further notice,

but that it was not intended and could not in any way curtail the independent right of employees, under section 16 (b), to bring their own suits to recover whatever compensation may be due them under the Act.

Mr. Walling said:

> Following the Supreme Court decision in *Kirschbaum* v. *Walling*, 316 U. S. 517, the Wage and Hour Division issued release R–1890, dated October 17, 1942, in which it reiterated its opinion that maintenance employees in buildings in which the tenants carried on interstate commerce activities are covered by the Fair Labor Standards Act. It was there pointed out that the Supreme Court, in the *Kirschbaum* decision, had held that maintenance employees working in loft buildings in which the tenants produced goods for interstate commerce are covered by the Act, and it was stated that the Division believed that maintenance employees in buildings in which the tenants carried on interstate activities were similarly covered by the Act.
>
> In view of recent decisions of the courts in employee suits brought by maintenance employees in office and bank buildings, L. Metcalfe Walling, the Administrator of the Wage and Hour and Public Contracts Divisions, announced today that until the courts indicated that the Act applied, or until further notice, he would take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act, with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce. He

> also stated that, in the interests of simplicity and uniformity in the application of this policy, for the present he would not include in the computation of the 20 percent banking firms or other firms whose interstate activities are limited to the preparation and transmission of documents, communications or correspondence, although in his opinion such activities involve production of goods for commerce as defined in the Fair Labor Standards Act and of course involve engaging in commerce.

In this connection, the Administrator called attention to the fact that under the Act, goods are broadly defined to include:

> * * * goods (including ships and marine equipment, wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof * * *.

and that under the Act production means:

> * * * produced, manufactured, mined, handled, or in any other manner worked on in any State, and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

U. S. GOVERNMENT PRINTING OFFICE: 1949

# SUPREME COURT OF THE UNITED STATES.

No. 820.—October Term, 1944.

10 East 40th Street Building, Inc., Petitioner, vs. Charles Callus, Samuel Said, Louis Saggese, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[June 11, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The Fair Labor Standards Act of 1938 regulates wages and hours not only of employees who are "engaged in commerce" but also those engaged "in the production of goods for commerce". Sections 6, 7, 52 Stat. 1060, 1062-63, 29 U. S. C. §§ 206, 207. For the purposes of that Act "an employee shall be deemed to have been engaged in the production of goods if such an employee was employed . . . in any process or occupation necessary to the production thereof, in any State". Section 3(j). When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *Kirschbaum Co.* v. *Walling*, 316 U. S. 517. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, *e. g.*, the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." *Kirschbaum Co.* v. *Walling*, *supra* at 523. Thus, Congress withheld from the courts the aid of constitutional criteria, compare, *e. g.*, *Currin* v. *Wallace*, 306 U. S. 1; *Wickard* v. *Filburn*, 317 U. S. 111; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, as well as the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency. Compare, *e. g.*, *Labor Board* v. *Fruehauf Co.*, 301 U. S. 49; *Gray* v. *Powell*, 314 U. S. 402, 412.

The Act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions. The lower courts, and only in a lesser measure this Court, have been plagued with problems in connection with employees of buildings occupied by those having at least some relation to goods that eventually find their way into interstate commerce.

In *Kirschbaum* v. *Walling, supra,* we were concerned with maintenance employees of buildings concededly devoted to manufacture for commerce. In *Borden Co.* v. *Borella*, decided this day, the Fair Labor Standards Act was invoked on behalf of maintenance employees of a building owned by an interstate producer and predominantly occupied for its offices. Recognizing that the question in every case is "whether the particular situation is within the regulated area", we concluded that the employees of the buildings in the *Kirschbaum* case "had such a close and immediate tie with the process of production" carried on by the lessees as to come within the Act. The *Borden* case involved Borden employees who, if they had been under the same roof where the physical handling of the goods took place, could hardly, without drawing gossamer and not merely nice lines, be deemed not to be engaged in an "occupation necessary to the production of goods" as described by § 3(j). To differentiate, in the incidence of the Fair Labor Standards Act, between maintenance employees who worked in the building where the business of the manufacture of milk products goes on and employees pursuing the same occupation for the Borden enterprise in an office separate from the manufacturing building, is to make too much turn on the accident of the division of the whole industrial process. The case immediately before us presents still a third situation differing both from *Kirschbaum* and *Borden*.

The facts are these. Petitioner owns and manages a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises including executive and sales offices of manufacturing and mining concerns, sales agencies representing such concerns, engineering and construction firms, advertising and publicity agencies, law firms, investment and credit organizations and the United States Employment Service. The distribution of occupancy in relation to the ultimate enterprises of the different groups of tenants was the subject of conflicting testimony and interpretation, but in our view does not call for particularization. Indisputably, the building is devoted

exclusively to offices, and no manufacturing is carried on within it. The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They brought this suit under § 16(b) of the Fair Labor Standards Act for claims of overtime payment to which they are entitled if their occupations be deemed "necessary to the production" of goods for commerce. ~~Concededly~~ they are not "engaged in commerce". The District Court dismissed the suit. 51 F. Supp. 528. The Circuit Court of Appeals reversed. 146 F. 2d 438. By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48% of the rented area, the maintenance employees of the owners of the building are engaged in occupations "necessary for the production" of goods for commerce. Conflict between this result and that reached by other circuits led us to bring the case here. 324 U. S. —.[1]

The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. See *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Walton* v. *Southern Package Corp.*, 320 U. S. 540; *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134. In giving a fair application to § 3(j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority." *Kirschbaum Co.* v. *Walling*, *supra* at 525. For as was pointed out in *Walling* v. *Jacksonville Paper*

1-See, *e. g.*, Johnson *v.* Dallas Downtown Development Co., 132 F. 2d 287; Cochran v. Fla. Nat. Bldg. Corp., 134 F. 2d 615; Tate *v.* Empire Bldg. Corp., 135 F. 2d 743; Johnson *v.* Masonic Bldg. Corp., 138 F. 2d 817.

*Co., supra* at 570, we cannot "be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states". We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.

Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The differences between employees of a building owned by occupants producing therein goods for commerce, and the employees of a building intended for tenants who produce such goods therein, and the employees of the office building of a large interstate producer, are too thin for the practicalities of adjudication. But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.

We have heretofore tried to indicate the nature of the nexus between employees who, though not themselves engaged in commerce, are engaged in occupations necessary for the production of goods for commerce by describing the necessary work that brings the occupation within the scope of the Act as work that had "a close and immediate tie with the process of production". *Kirschbaum Co.* v. *Walling*, *supra* at 525. Doubtless more felicitous adjectives could be chosen, but the attempt to achieve a form of words that could avoid an exercise of judgment that a particular occupation is more in the nature of local business than not, is merely to be content with formulas of illusory certainty.

On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations. It is a distinction appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act. Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us. But for drawing the figurative line the basis must be something practically relevant to the problem in hand. We believe that is true of the line drawn in this case.

*Judgment reversed.*

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Mr. Chief Justice Stone.

The views I expressed in my dissent in No. 688, *Borden Company* v. *Borella*, would, if accepted, control the decision in this case. As those views have been rejected by the Court, I join in the Court's opinion in this case.

Mr. Justice MURPHY, dissenting.

A proper understanding of the nature of the activities carried on in petitioner's 48-story office building in New York City leads to the inevitable conclusion that the respondent maintenance employees, like those in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, and in *Borden Co.* v. *Borella*, decided this day, are engaged in occupations "necessary to the production of goods for commerce" and hence are entitled to the benefits of the Fair Labor Standards Act of 1938.

(1) Approximately 26% of the rentable area of the building is occupied by the executive offices of manufacturing and mining concerns which are concededly engaged in the production of goods for commerce. Corporate policies are formed and directed from these offices. Most of them purchase raw materials for use in the physical processes of manufacturing. They keep in constant and close contact with the factories, supervising all of the manufacturing activities. Some of these offices draft designs and specifications for the articles produced in the factories. Business and sales departments located in these offices do work in connection with the distribution of these products. One office even handles parts for the machines manufactured by the company, doing repair work on the parts and packing and shipping them to out-of-state customers.

The case in this respect is indistinguishable from the facts in the *Borden* case. Here, as in the *Borden* case, the officers and employees working in these offices are part of the coordinated productive pattern of modern industry. The fact that none of the physical processes of manufacturing occurs in the same building is immaterial. Production requires central planning, control, supervision, purchase of raw materials, designing of products, sales promotion and the like as well as the physical, manual processes of manufacturing. These various central offices, then, are "part of an integrated effort for the production of goods," *Armour & Co.* v. *Wantock*, 323 U. S. 126, 130. And since the maintenance employees stand in the same relation to this productive process as did the employees in the *Kirschbaum* case, it follows that they are engaged in occupations "necessary to the production of goods for commerce."

The *Kirschbaum* case also made it clear that the provisions of the Act "expressly makes its application dependent upon the

character of the employees' activities." 316 U. S. at 524. Hence it is immaterial that the owner of the building which employs the respondent maintenance employees is not shown to have been engaged in the production of goods for commerce. As in the *Kirschbaum* case, it is enough if the employees are necessary to the production of goods by tenants occupying the building in which they work.

(2) Approximately 6.5% of the rentable area of the building is occupied by concerns engaged in writing and preparing mimeographed, photographic and printed matter which is shipped in interstate commerce. One company produces between 15,000 and 20,000 pages of mimeographed materials per week, 90% of which is sent outside the state. Another tenant produces 60 magazines having national circulations. Other concerns produce large quantities of pamphlets, photographs, magazines and advertising matter for interstate shipment.

Since telegraphic messages are "goods" within the meaning of the Act, *Western Union* v. *Lenroot*, 323 U. S. 490, 502-503, it would seem clear that these magazines, pamphlets, etc. which are prepared in petitioner's office building are likewise "goods." And since the term "produced" includes "every kind of incidental operation preparatory to putting goods into the stream of commerce," *ibid.*, 503, the writing and preparation of these materials constitutes "production of goods" for interstate commerce. Here again the respondent maintenance employees are related to production in the same way as were the employees in the *Kirschbaum* case, thus making it clear that they are covered by the Act from this standpoint.

It is unnecessary to describe the activities of the other tenants, although it is conceded that about 58% of the total rentable area is occupied by concerns not engaged in the production of goods for commerce. It is sufficient that approximately 32.5% of the rentable area is devoted to production. The Administrator of the Wage and Hour Division of the Department of Labor has stated that he will take no enforcement action "with respect to maintenance employees in buildings in which less than 20 percent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce." Wage and Hour Division Release, November 19, 1943, P. R.-19 (rev.) Whether 20% occupancy by such firms is a reasonable minimum is not in issue here.

Clearly a 32.5% occupancy is so substantial as to remove any doubt that the maintenance employees devote a large part of their time to activities necessary to the production of goods for commerce. Hence they are covered by the Act.

The starting point in cases of this nature is not to decide whether the activities carried on in the office buildings in question satisfy some nebulous "common understanding of what is local business." The crucial problem, rather, is to determine whether such activities constitute an integral part of the productive process. Once it is clear that the activities are part of the process of production of goods for interstate commerce the interstate character of the activities becomes obvious; and it follows that occupations necessary to those activities partake of their interstate flavor. Neither attenuated analysis nor scholastic logic is necessary to understand the scope and coordination of the modern productive pattern and the integral part played by those who manage and direct the physical processes of production. To apply the Act in light of elementary economic facts is not beyond the ability of judges or beyond the intention of Congress.

Congress plainly intended "to leave local business to the protection of the states," *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570, when it enacted this statute. But there is no indication that it intended to divide the process of producing goods for interstate commerce into interstate and local segments, applying the statute only to the former. And when Congress said that employees "necessary to the production" of goods for commerce were to be included within the Act, it meant just that, without limitation to those who were necessary only to the physical manufacturing aspects of production. Under such circumstances it is our duty to recognize economic reality in interpreting and applying the mandate of the people.

Mr. Justice BLACK, Mr. Justice REED and Mr. Justice RUTLEDGE join in this dissent.